

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1165

Cir. Ct. No. 2012TP10

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO ISABEL K., A PERSON UNDER
THE AGE OF 18:**

EAU CLAIRE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

KENNETH S.,

RESPONDENT-APPELLANT,

CHRISTINE K.,

RESPONDENT.

APPEAL from orders of the circuit court for Eau Claire County:
WILLIAM M. GABLER, SR., Judge. *Affirmed.*

¶1 STARK, J.¹ Kenneth S. appeals an order terminating his parental rights to his daughter, Isabel K., and an order denying his motion for postdisposition relief. Kenneth argues his trial counsel rendered ineffective assistance by failing to move to sever his trial from the trial of Isabel’s mother. We reject Kenneth’s argument, and affirm.

BACKGROUND

¶2 Isabel was born to Kenneth and Christine K. on September 7, 2006.² Kenneth and Christine were never married, but they lived together until Isabel was approximately two years old. Isabel then lived with some nonrelatives. In April 2009, Christine told the Eau Claire County Department of Human Services (County) she could not care for Isabel and asked the County to place Isabel in foster care. The County took Isabel into custody and, after determining Kenneth was not an appropriate placement, placed her in foster care.³

¶3 In July 2009, Isabel was found to be a child in need of protection and services. The court ordered various conditions that Kenneth and Christine were required to complete before Isabel could be returned to either parent’s care. Approximately three years later, in August 2012, the County petitioned to terminate Kenneth’s and Christine’s parental rights to Isabel. For each parent, the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Christine is not a party to this appeal.

³ Social worker Kari Crawford explained the County determined Kenneth was not an appropriate placement because he was “a registered sex offender and would be registered until 2017, and the information [was] that Ken had not had a substantial relationship with Isabel prior to that time.”

petition alleged a single ground of termination—that Isabel remained a child in continuing need of protection or services (“continuing CHIPS”), as defined in WIS. STAT. § 48.415(2)(a).

¶4 Kenneth immediately contested the petition and demanded a jury trial. Christine was equivocal about whether she wished to contest the petition. At the final hearing before the scheduled jury trial, Kenneth’s counsel informed the court that he would “probably” move to sever Kenneth’s trial from Christine’s if Christine intended to contest the petition. Counsel explained, “[I]t would be a royal mess to have them both here testifying against each other” At that time, Kenneth was incarcerated for a domestic abuse incident involving Christine, who reported Kenneth threw her onto the stairs, grabbed her neck, and choked her. The circuit court told Kenneth’s counsel that if counsel was “inclined to file a [severance] motion, I’ll schedule it and we can argue it.”

¶5 Ultimately, Christine decided to contest the termination of parental rights petition. Kenneth’s counsel, however, never filed a severance motion, and Kenneth and Christine had a joint jury trial.

¶6 At trial, social worker Kari Crawford testified that, after Isabel was found to be a child in need of protection and services, the court ordered Kenneth to complete eleven conditions in order to have Isabel returned to his care. Of the eleven conditions, Kenneth was compliant with five.⁴ Crawford then testified

⁴ Crawford testified Kenneth was compliant with the following conditions:

1. Isabel K[.] shall remain placed in an Eau Claire County licensed foster home.

(continued)

concerning each condition with which Kenneth was not compliant, and explained why Kenneth was not compliant with that condition.⁵ Significantly, Kenneth had

2. Kenneth shall cooperate with Isabel's placement and under no circumstances interfere with the placement or programs or services.

....

4. Kenneth shall sign releases of information as requested by the Department.

....

7. Kenneth shall only use certified or licensed day-care providers for Isabel.

8. Kenneth shall consistently demonstrate the ability to meet his own needs by responsively [sic] managing his income, paying bills in a timely manner, and maintaining stable housing.

⁵ Kenneth was not compliant with the following conditions:

3. Kenneth shall cooperate with the Department of Human Services while this order is in effect, including but not limited to access to living quarters, meeting with social workers and service providers, and immediately informing the Department of changes in address.

....

5. Kenneth shall successfully complete the Family Interaction Program through Lutheran Social Services. Kenneth shall maintain all scheduled supervised visitation with Isabel. Kenneth shall concentrate on establishing a strong bond and attachment with his child during visitation.

6. Kenneth shall not allow anyone to live with him or stay overnight at his home without prior authorization from the Department.

....

9. Kenneth shall complete a psychological evaluation at a clinic approved by the Department within 60 days of this court date.

(continued)

failed to complete sex offender therapy, missed appointments,⁶ missed visits with Isabel, failed to complete Family Interaction Programing, failed to follow through with the therapy and counseling recommendations made in his psychological evaluation, and was inconsistent in maintaining contact with Isabel.

¶7 Crawford also testified the County provided Kenneth with assistance to meet his court-ordered conditions. This included offering Kenneth gas cards and mileage reimbursement for travel to evaluations, therapy, Isabel's appointments, and visits with Isabel. The County offered to pay for any cost incurred by Kenneth to complete assessments, evaluations, and programing, and the County made referrals for Kenneth to participate in therapeutic parent retraining and sex offender therapy. Crawford stated she was regularly calling Kenneth, sending him letters, offering assistance, and setting up appointments for him so that he could complete the conditions for return.

¶8 Finally, Crawford opined that, given the case history, she did not believe Kenneth would complete the conditions for return within the next nine

Kenneth shall follow any and all recommendations made by the clinician.

10. Kenneth shall successfully complete sexual offender treatment and be able to demonstrate no to low risk of reoffending. Kenneth shall follow any and all recommendations made by his training therapist.

11. Prior to reunification, Kenneth shall consistently demonstrate over a significant period of time the ability to adequately and appropriately meet Isabel's emotional, physical, nurturance, safety, and protection needs.

⁶ Crawford did not specify the nature of the appointments Kenneth missed; however, her testimony about missed appointments was offered as an explanation as to why Kenneth was not compliant with condition three, which provided, in part, Kenneth shall "meet[] with social workers and service providers."

months. She explained that, in August 2011, she informed Kenneth that because of his lack of progress in completing the court-ordered conditions, the County was going to be asking the court to change Isabel's primary permanency plan goal from reunification to adoption. Crawford stated,

There was a period of time shortly after we had made the change at that permanency plan review hearing to switch the goals that Ken was being very consistent with sex offender therapy and I was encouraged that he may be able to complete that successfully, so we postponed that filing of the TPR in hopes that he would complete that.

Crawford gave Kenneth an extra year to complete the conditions for return. However, he failed to comply and the County then petitioned to terminate Kenneth's parental rights.

¶9 Crawford offered similar testimony about Christine. Christine was court ordered to complete twelve conditions in order to have Isabel returned to her care. Crawford testified Christine was compliant with five of the twelve conditions. Crawford then recited each condition with which Christine was not compliant. Christine stopped visiting Isabel for months at a time, and once failed to visit her for an entire year. Christine did not follow through with therapy or counseling and did not participate in therapeutic parent retraining. Crawford also opined Christine would not complete the conditions for return within the next nine months because the County had already given Christine three-and-one half years to complete the conditions and she had not yet done so.

¶10 Social worker Kimberly Carlo testified she supervised Isabel's visits with Kenneth and Christine. Kenneth began visiting with Isabel in May 2009. Christine started having visits with Kenneth and Isabel in December 2010. Carlo explained visits with Kenneth, Christine, and Isabel were difficult because

Kenneth and Christine would arrive at visits bickering and continue to argue during the visits, which would upset Isabel. Carlo, however, testified Kenneth did a relatively “nice job” parenting during visits. He engaged in age-appropriate conversations, arranged appropriate activities, and was able to read Isabel’s “cues.”

¶11 Kenneth testified he had complied with all of the court-ordered conditions for return except sex offender therapy. However, on cross-examination, the County reviewed with Kenneth each of the noncompliant conditions that Crawford identified, and Kenneth ultimately conceded he was not compliant with multiple conditions.

¶12 Christine conceded she was not compliant with each condition identified by Crawford. She testified she did not see Isabel from June 2009 until September 2009 because she did not want to participate in supervised visits. Christine visited Isabel for a few months at the end of 2009, but then stopped visiting Isabel for a year because Kenneth told her to “stay away from the situation” and she was a “bad mother.” She explained Kenneth was “very angry” with her for voluntarily placing Isabel in foster care.

¶13 Christine started visiting Isabel again in November 2010. When asked to explain why she was angry during Isabel’s joint visits with Kenneth, Christine testified she and Kenneth had been in conflict with each other since she placed Isabel in foster care and, on the way to visits,

Ken would become very not physically abusive, just verbally abusive towards me ... he would yell at me all the way to the visit. I mean, screaming at me ... [there were] a couple instances where he pulled alongside the road and started screaming in my face ... why am I doing – it’s because of me And so these things persisted at every

visit going there because I was a bad mother, he said, yes.

Christine stated she and Kenneth “were getting along until ... I placed her basically.” Christine stopped visiting Isabel in 2012 because she went to the United Kingdom for three months. When her counsel asked if she left for the United Kingdom in part to get away from Kenneth, Christine agreed, but stated there were many reasons. She also testified she believed Kenneth was happy she was gone.

¶14 Finally, Christine testified that visits without Kenneth were better because she and Kenneth had a different way of parenting and Christine believed Isabel was happier when she visited by herself. Christine agreed that, going forward, it would be best if Kenneth was not “part of the unit.” When her counsel asked if she was ready to complete conditions by engaging in therapy and meeting with a psychiatrist, Christine said she would engage in counseling because it was a condition, but felt the County was “wasting [its] time, especially mine.” Christine also testified that she would complete the conditions for return within the next nine months because she “made no effort” before, but now, she “ha[s] it together.”

¶15 During closing arguments, Kenneth’s counsel argued that, although Kenneth had not yet completed the conditions, he has and would continue to work toward completion because he cares for Isabel. Counsel emphasized Kenneth has done a good job parenting during visits with Isabel, and, until July 2012, never missed seeing her for more than two-and-one-half weeks.

¶16 Christine’s counsel asked the jury to recall that Christine testified Kenneth would scream at her and that she went to the United Kingdom to get away from Kenneth. Christine’s counsel argued Christine would be able to

complete the conditions for return within the next nine months because she had finally broken up with Kenneth and was a stronger individual.

¶17 The jury found grounds to terminate Kenneth’s and Christine’s parental rights. Following a dispositional hearing, the circuit court terminated the parental rights of Kenneth and Christine to Isabel.

¶18 Kenneth moved for postdisposition relief, alleging his trial counsel’s failure to move to sever his trial from Christine’s deprived him of the effective assistance of counsel. Kenneth argued he was prejudiced by counsel’s failure to move to sever the trial because Christine, through her testimony, blamed him for her inability to satisfy the CHIPS conditions and portrayed him as an abusive bully.

¶19 Following a *Machner*⁷ hearing, the circuit court determined Kenneth’s trial counsel was deficient for failing to file a severance motion.⁸ However, the court concluded Kenneth was not prejudiced by counsel’s failure.

¶20 Specifically, the court found the County’s witnesses were “incredibly persuasive” and “the testimony in this trial clearly and unambiguously showed that both Kenneth ... and Christine ... fell far short of the legal requirements to obtain custody of their daughter, Isabel.” The court emphasized Christine’s “profound mental health disabilities” and the fact that Kenneth was

⁷ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

⁸ The court reasoned that, although Kenneth’s trial counsel believed a severance motion would not be successful, counsel had not adequately researched the issue, Kenneth specifically requested his counsel to file the severance motion, and Kenneth had a legitimate basis for the motion.

“burdened by a sex offense” The court also found that Kenneth and Christine “had poor demeanors” when they testified. The court elaborated that Kenneth “had an incredibly flat affect ... [and an] I don’t care air about him.” The court stressed Kenneth’s credibility was undermined when, on his direct examination, “he claimed that other than not completing sex offender programing he had done everything else that was expected of him;” however, “on cross-examination, [the County] very effectively pointed out that wasn’t true.” The court also determined Christine’s comments about abuse were relatively minimal, and “the vast majority of Christine[’s] testimony, both on direct and cross-examination, related to her failure to comply with the dispositional order.” The court concluded that, given the overwhelming evidence, the transient comments about abuse were insufficient to undermine its confidence in the outcome.

DISCUSSION

¶21 A parent in a termination of parental rights action has the right to the effective assistance of counsel. *Oneida Cnty. Dept. of Social Servs. v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. We review a claim of ineffective assistance of counsel under a mixed standard of review. *State v. Manuel*, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811. The circuit court’s findings of fact are upheld unless clearly erroneous, and we independently review the application of legal principles to those facts. *Id.*

¶22 To establish ineffective assistance of counsel, Kenneth must prove his counsel’s performance was deficient and he was prejudiced by this deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984). If Kenneth fails to establish either prong of the *Strickland* test, we need not determine whether the other prong is satisfied. See *id.* at 697.

¶23 Kenneth first argues his trial counsel performed deficiently by failing to move to sever his trial from Christine's. He asserts counsel should have moved to sever the trials because counsel knew about the history of antagonism between the parents, including the fact that Kenneth was incarcerated for physically abusing Christine, and such evidence would negatively affect the jury's perception of him.

¶24 The circuit court determined the performance of Kenneth's trial counsel was deficient. For purposes of this appeal, we will assume without deciding that Kenneth's trial counsel was deficient for not moving to sever his trial from Christine's. Therefore, we begin our analysis by considering whether Kenneth was prejudiced by counsel's deficiency. Prejudice is proven if Kenneth shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶25 To prove the ground of continuing CHIPS at trial as to Kenneth, the County needed to show that: (1) Isabel was adjudged in need of protection or services and had been removed from the home for six months or longer pursuant to a court order containing the required warnings; (2) reasonable efforts to provide court-ordered services were made; (3) Kenneth failed to meet the conditions established for Isabel's return to her home; and (4) there was a substantial likelihood that Kenneth would not meet those conditions within the nine-month period following the trial. *See* WIS. STAT. § 48.415(2)(a); *see also* WIS JI—CHILDREN 324A (2011).

¶26 On appeal, Kenneth “concedes the [C]ounty’s evidence was strong on the first three verdict questions” but he asserts the fourth special verdict question was in dispute. He emphasizes portions of Christine’s testimony and her counsel’s closing argument,⁹ which he asserts prejudiced him because they portrayed him as an abusive bully who prevented Christine from completing her court-ordered conditions for return. He argues this testimony would not have been admitted into evidence at a severed trial because it occurred outside Isabel’s presence and was unduly prejudicial. Kenneth contends Christine’s testimony was of the sort that would arouse jurors’ sympathies. He asserts confidence in the outcome is undermined as the jury may have answered the fourth special verdict question affirmatively because “it was inflamed by Christine’s testimony and her attorney’s argument attacking Kenneth’s character.”

¶27 We conclude this testimony and argument did not prejudice Kenneth to the extent that our confidence in the outcome is undermined for a number of reasons. First, the record reveals Christine’s objectionable testimony amounted to only a small portion of the evidence and was not as objectionable as Kenneth characterizes. That limited testimony indicated Christine and Kenneth “were getting along until ... I [Christine] placed her basically.” Christine explained that Kenneth made the statements that she was “a bad mother” and to “stay away” because he was “very angry” with her for voluntarily placing Isabel in foster care. The jury, by finding grounds to terminate Christine’s parental rights, rejected any

⁹ Specifically, Kenneth emphasizes that Christine testified Kenneth “screamed” at her, told her to “stay away from the situation,” and called her “a bad mother.” He also highlights Christine’s testimony that Isabel “seemed happier” when Kenneth was not around, that it would be best for her and Isabel if Kenneth was not part of the unit, and that, in 2012, she left the country in part to get away from him. Finally, he stresses that, during closing arguments, Christine’s counsel highlighted some of this testimony and argued Christine would be able to complete the conditions for return because she had separated from Kenneth.

theory of defense advanced by her counsel that involved alleged abuse on the part of Kenneth.¹⁰

¶28 Second, we disagree with Kenneth that, had the trials been severed, all of the testimony he identified as prejudicial would have been excluded. For example, Christine’s testimony about Kenneth stopping the vehicle on the way to joint visits to “scream” at her and call her “a bad mother” was offered as an explanation for why Christine and Kenneth arrived at Isabel’s joint visits arguing and continued to argue during the visits. As Kenneth recognizes, “had this case been tried separately, the [C]ounty could still have presented evidence about how he and Christine argued during their joint visits with Isabel.”

¶29 Finally, and most significantly, the evidence supporting the fourth special verdict question was strong and compelling. Crawford testified the County waited more than three years to petition to terminate Kenneth’s parental rights. She explained the County would have petitioned to terminate Kenneth’s parental rights in 2011 but, once Kenneth knew the County was going to pursue termination, Kenneth renewed his efforts to work on his court-ordered conditions. Crawford delayed filing the petition an extra year in the hopes that Kenneth and Isabel could be reunited. However, Kenneth never became compliant, causing the County to petition to terminate his parental rights.

¹⁰ We also observe the record does not support Christine’s counsel’s closing argument that Christine would now be able to complete her conditions because, unlike before, she is no longer with Kenneth. Social worker Crawford testified that, in April 2009, when Christine initially contacted the County to place Isabel in foster care, Christine told her she needed assistance because she was in an abusive relationship. Crawford clarified that Christine was not in a relationship with Kenneth during this time. Crawford also testified that Christine did not visit Isabel from December 2009 until November 2010. Crawford explained that, during the majority of 2010, Christine was living with another partner, and that she moved in with Kenneth at the end of 2010.

¶30 Although Kenneth testified he would complete the conditions for return within the next nine months, in its decision denying Kenneth’s postdisposition motion, the circuit court found Kenneth “had [a] poor demeanor[.]” when he testified and that his credibility was undermined when he unequivocally testified he was compliant with all the conditions except sex offender therapy and then later conceded he was not compliant with multiple conditions. Conversely, the circuit court noted social worker Crawford was an “incredibly persuasive” witness with “an encyclopedic knowledge of this case.” We will uphold the circuit court’s credibility determination unless it is clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. Based on our review of the record, we conclude the circuit court’s credibility determination is not clearly erroneous. Our review of the record leads us to agree with the circuit court’s determination.

¶31 Given the overwhelming evidence and Christine’s limited testimony about Kenneth’s actions toward her, we cannot say that, but for Kenneth’s trial counsel’s failure to move for severance, there is a reasonable probability the result would have been different. Because Kenneth has not proved he was prejudiced, Kenneth has not established he received ineffective assistance of counsel. *See Strickland*, 466 U.S. at 686, 697. Accordingly, we affirm the court’s order terminating his parental rights to Isabel and the order denying his motion for postdisposition relief.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

